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May 3, 2006

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Hearing Officer's Decision

Name of Case: Personnel Security Hearing

Date of Filing: November 30, 2005

Case Number: TSO-0320

This Decision concerns the eligibility of xxxxxxxxxxxxxx (hereinafter "the individual") for continued access authorization. The regulations governing the individual's eligibility are set forth at 10 C.F.R. Part 710, "Criteria and Procedures for Determining Eligibility for Access to Classified Matter or Special Nuclear Material." This Decision will consider whether, based on the testimony and other evidence presented in this proceeding, the individual's suspended access authorization should be restored. For the reasons detailed below, it is my decision that the individual's access authorization should be restored.

I. BACKGROUND

On June 27, 2005 a DOE consulting psychiatrist evaluated the individual. The DOE consulting psychiatrist diagnosed the individual as alcohol dependent in early full remission.¹ See Diagnostic and Statistical Manual of the American Psychiatric Association, 4th edition, Text Revision (DSM-IV). On September 19, 2005 the DOE issued a notification letter to the individual. The statement of concerns attached to the notification letter found that the DOE consulting psychiatrist's diagnosis gives rise to a security concern under Criteria H and J. 10 C.F.R. § 710.8 (h) and (j).

The statement of concerns indicates that the individual was arrested for Driving While Intoxicated (DWI) on December 10, 2004. At that time his blood alcohol registered .18. The statement further indicated that during an April 11, 2005 personnel security interview (PSI) and during the consulting psychiatrist's June 25, 2005 interview the individual stated that he is alcohol dependent. Finally, the statement indicates that during the PSI the individual stated that for the 18 months prior to his DWI arrest, his consumption of alcohol made it difficult for him to accomplish household tasks and during that period the individual and his wife had a number of arguments about the level of his alcohol consumption.

In the notification letter, the Manager informed the individual that he was entitled to a hearing before a hearing officer in order to respond to the information contained in the notification letter. The individual

¹ The DOE consulting psychiatrist testified that if the individual's statement at the March 2006 hearing that he has not consumed alcohol in 15 months is accurate then he would be in "sustained full remission" as that term is used in the DSM-IV. He testified that sustained full remission does not mean that the risk of relapse is low. Rather its sole meaning is that the individual has not consumed alcohol in the last year. Tr. at 50.

requested a hearing. I was appointed to serve as the hearing officer. In accordance with 10 C.F.R. § 710.25(e) and (g), in March 2006 I convened a hearing in this matter (hearing).

At the hearing the individual testified and presented the testimony of his psychiatrist, his treating counselor, his wife, his stepson and seven other witnesses. Below is a summary of the testimony at the hearing.

II. HEARING

The individual's attorney indicated in his opening statement at the hearing that the individual agrees with the DOE consulting psychiatrist's diagnosis and the facts indicated in the statement of concerns. He further indicated that he believes the testimony at the hearing will indicate that the individual has been abstinent for 15 months, has received effective treatment, and is committed to abstinence. Transcript of Hearing (Tr.) at 7.

A. The DOE Consulting Psychiatrist

The majority of the DOE consulting psychiatrist's testimony came during his testimony as the first witness and his testimony at the end of the hearing. At the start of the hearing, the DOE consulting psychiatrist testified that the individual told him that he started consuming alcohol when he was in 5th grade and gradually increased his consumption until he was consuming a case of beer on the weekends during his mid 20s. Tr. at 18. Between 1986 and 2004 the individual was a user of alcohol habitually to excess. Tr. at 21. Finally, the DOE consulting psychiatrist testified that the individual's alcohol consumption in 2003 and 2004 indicated that the individual was alcohol dependent. Tr. at 18.

The consulting psychiatrist testified that at the time of his June 2005 interview the individual "was doing all the right things, but he hasn't done it for a long enough time [to be considered rehabilitated]." Tr. at 19. The DOE consulting psychiatrist testified that

in this particular case probably the most important part is there adequate evidence of rehabilitation or reformation, the DOE also doesn't define adequate. And I've struggled with that for years and have asked so many times, you know, to the people that write me these letters, I say, can you tell me what you mean by adequate? And they say no, they can't, because it's not in the rule and regulations, and you define it how you think it's appropriate.

Tr. at 14. He indicated that the fundamental question is whether the individual poses a reasonable security concern, and that relates to the risk of relapse. Tr. at 14. He stated in this regard:

. . . what if someone has a 50% risk of relapse in the next five years, would that be an acceptable security concern. And, you know, we played around with all the numbers and I came to the almost commonsense conclusion that about a 10% risk of relapse in the next five years seemed like that would be acceptable. But again, there is a lot of judgment call and gray areas, so that's how I define adequate degree of rehabilitation or reformation, where the risk of relapse in the next five years is low, which I defined as ten percent or less.

Tr. at 15.

The DOE consulting psychiatrist defined a relapse as “drinking to the point of intoxication, because that’s where the security concern is.” Tr. at 16.

The DOE consulting psychiatrist testified that, in general, a person diagnosed as alcohol dependent needs a treatment program and 3 years of abstinence in order to demonstrate a 10% chance of relapse in the next five years.² Tr. at 20. However, he believes that because of the individual’s “good prognostic factors, his sincerity, his support system” he only required two years of abstinence to have a 10% chance of relapse. Tr. at 47. During his testimony the consulting psychiatrist mentioned several positive factors: “his sincerity, his support system.” Tr. at 47; “things were going well for [the individual], he was satisfied with his job, things were going well.” Tr. at 51; and the individual’s long term employment with the DOE. Tr. at 54.

After hearing all of the testimony at the hearing the DOE consulting psychiatrist gave some additional testimony updating his view of the individual’s situation. He testified that the individual is

doing all the right things, and I just wish you had a little bit more time. If this hearing was six months from now, I’d have no problem with everything I’ve heard, saying, in my opinion that’s adequate [evidence of rehabilitation]. But on the other hand, the Hearing Officer knows how I’m defining the terms [adequate rehabilitation], and it’s up to the DOE, really, not me, to say how they look at adequate, but at least I’ve said how I look at it.

Tr. at 177.

B. The Individual’s Psychiatrist

The individual’s psychiatrist testified that between 1990 and 1995 he was a consulting psychiatrist for the DOE. Tr. at 32. During that period he did approximately 200 evaluations for the DOE. Tr. at 32. He saw the individual for an evaluation on November 7, 2005. During that evaluation he diagnosed the individual as alcohol dependent in full sustained remission. Tr. at 35.

The individual’s psychiatrist testified that the individual was open and candid and that he “recognizes that there is a problem” and “he was really focused on treatment, and I think that’s very important.” Tr. at 37. He pointed out that the individual attends AA meetings three times a week, has an AA sponsor, and is committed to AA. Tr. at 37. He testified that he believes the individual has been abstinent since December 2004. Tr. at 36.

² The DOE consulting psychiatrist indicated that the 1994 Makela Alcoholism Study tracks 10,000 Finnish AA members over many years. The study finds that “with a year of sobriety [the study’s participants] risk of relapse in the next year is about thirty percent. With two years of sobriety [the study’s participants] risk of relapse is about 20 percent. With three or more years of sobriety and going to AA, [the study’s participants] risk of relapse is 10% or less.” Tr. at 20. The DOE consulting psychiatrist testified that he used this study to help him determine that normally alcohol dependent individuals that have entered a treatment program and are attending AA meetings require three years of abstinence to demonstrate a 10% chance that they will not consume alcohol to intoxication in the next five years. Tr. at 20.

He testified that he believes that performing service work for AA is a positive indicator that an individual will continue with AA. He indicated that the individual has worked at the desk at the AA office since December 2005. The individual's psychiatrist indicated that the attendance of the individual's wife at a support group shows family support and a family commitment to help the individual maintain his sobriety. Tr. at 40. Other factors that the individual's psychiatrist testified indicate to him that the individual is unlikely to relapse are: "a stable relationship with his wife" and the individual's recent diagnosis of diabetes. In this regard, the individual recognizes that future use of alcohol could cause him serious health problems. Tr. at 42.

C. The Treating Counselor

The treating counselor testified that the individual was referred to him by the Employee Assistance Program at the individual's work site. His first session with the individual took place on December 21, 2004. During the initial evaluative session, the individual openly admitted he has a problem with alcohol. Tr. at 83. He also "admitted that he needed complete abstinence." Tr. at 84. Because the individual readily admitted that he has a problem with alcohol, the treating counselor's counseling sessions focused on issues of relapse prevention. Tr. at 83. Initially the sessions were weekly, then bi-weekly and more recently the sessions are on an as needed basis. Tr. at 82. The treating counselor currently sees the individual about once a month. Tr. 86.

The treating counselor indicated that the individual was very motivated to maintain his abstinence. Tr. at 85. He pointed out that the individual "goes to AA, he's doing service work, and he has a lifestyle that is very conducive to recovery. He has self-interests, and he's peaceful as a person." Tr. at 86. He believes the individual is committed to his recovery program. Finally, he testified that he believes because the individual is doing everything he should do, the chance the individual will relapse is less than 10%.

D. The Individual's Social Friends

The individual's first social friend testified that he has known the individual for 25 years. Tr. at 58. He testified that he goes hunting and fishing with the individual three or four times a year. Tr. at 58. Each trip lasts two or three days. He testified that prior to December 2004 he saw the individual drink to excess on several occasions. Tr. at 59. He testified that he has not seen the individual consume any alcohol since December 2004. Tr. at 62. He testified when the other hunters in their group are drinking beer, the individual drinks sodas. Tr. at 62.

The individual's second friend testified that he has known the individual for twenty years. Tr. at 89. He testified that he sees the individual quite a bit because they are "good friends, and we hunt and fish a lot and hang out together." Tr. at 89. Prior to December 2004, he saw the individual consume alcohol on a number of occasions. He testified that he drank "sometimes two beers, sometimes six, it depends." Tr. at 91. He testified that he has not seen the individual consume any alcohol since December 2004. He testified that the individual told him he was never going to consume alcohol again. He believes the individual is committed to maintaining his abstinence. Tr. at 93.

E. Individual's AA Friends

The first AA friend testified that he has known the individual for the year that that the individual has been attending AA meetings. Tr. at 64. He testified that the individual attends four or five meeting per week. Tr. at 65. The individual is a strong contributing member of their 6:30 AM group meeting. Tr. at 66. He testified that he is impressed by the individual's "commitment to being sober, staying sober, learning how to live a sober life, this is what alcoholics anonymous teach you to do." Tr. at 67. He stated that he believes the individual will maintain his sobriety. Tr. at 67.

The second AA friend testified that he attends the 6:30 AM group meeting two or three times a week. He sees the individual on a regular basis at those meetings and has gotten to know the individual over the last eight or nine months. Tr. at 74. When the individual first attended AA meetings he was tense and uptight. Tr. at 75. More recently the individual has been open in the meetings and he is a good participant. Tr. at 76. The second AA friend believes that the individual is committed to a new way of life. Tr. at 76. He believes if the individual continues to do the things he knows he should do he will be able to maintain his sobriety. Tr. at 76.

F. The Individual's Co-workers

The first co-worker testified that he has known the individual as a co-worker since 1996. Tr. at 130. He has never seen the individual under the influence of alcohol and he has never seen the individual with any signs of a hangover. Tr. at 132.

The second co-worker testified that he has known the individual as a co-worker for more than 15 years. Tr. at 135. He testified that he has never seen the individual under the influence of alcohol, or shown any signs of his having consumed alcohol. Tr. at 138.

The individual's supervisor testified that he has known the individual for over a year. Tr. at 96. He testified that the individual told him about the December 2004 DWI arrest on the Monday following the weekend during which the arrest took place. He testified that the individual told him "he made a mistake, he needs to correct it, and he was going to immediately seek more assistance – more professional medical assistance." Tr. at 98. He believes the individual was sincere in maintaining his abstinence and in seeking treatment. Tr. at 98.

G. The Individual

The individual testified that he believes the DOE consulting psychiatrist's diagnosis of alcohol dependence is accurate. He also believes the alcohol consumption pattern described in the consulting psychiatrist's report is accurate. Tr. at 110. He testified that he has been abstinent since December 10, 2004. Tr. at 122. He further testified that he has been receiving counseling from the treating counselor since December 2004. Tr. at 124. In the last several months, he only sees the treating counselor when he has a "question about things I'm experiencing." Tr. at 124.

The individual testified that in 2004 he was in a pattern of consuming alcohol to relax when he was stressed. Tr. at 102. In 2004 after he had consumed a few drinks of alcohol he sometimes found it difficult to stop. Before his DWI arrest he realized something was wrong. However, he testified that he was in denial. Tr. at 103. When he was arrested for DWI in December 2004 he realized that he had a serious problem. Tr. at 104. Very soon after the DWI he contacted the EAP counselor and on January 5, 2005, he signed a "Voluntary Rehabilitation Contract" with the EAP counselor. Individual's exhibit #1. That contract specified that he would be tested for alcohol use once a month, attend 3 AA meetings per week and seek counseling. Tr. at 107. He successfully fulfilled that contract and on January 19, 2006 he entered into a second "Voluntary Recovery Agreement" with the EAP counselor that requires quarterly random alcohol tests and his attendance at 3 AA meeting per week. Tr. at 108 and Individual exhibit #3.

The individual testified that he currently attends at least 3 AA meeting per week and he started doing AA service work in December 2005. The individual described in detail his experiences in AA and the help he has received in understanding alcoholism and his problems as the child of an alcoholic. Tr. at 111-119. The individual testified that he does not believe he is ready to be an AA sponsor to another person. He testified that "I'm still a rookie, I mean, that's [being a sponsor] a big responsibility." Tr. at 123.

The individual testified that he now follows the principle of one day at a time. If he thinks about consuming alcohol he tries to think about the next morning and how he will not feel good about himself if he consumes alcohol. "Tomorrow morning I'm going to get up and feel good, feel spiritual. So if I think about that, that sure gets me by the process in a whole different mode." Tr. at 127.

H. The Individual's Family Members

The individual's wife and the individual's son by his first wife testified at the same time. The individual wife testified that she has known the individual since 1987. They were married in 1998. Tr. at 157. She testified that the individual's alcohol consumption increased in 2003 and she became concerned with the amount he consumed. Tr. at 159. During 2003 she saw a lot more beer cans and noticed that the individual had been drinking liquor after work. Tr. at 159. She testified that she noticed that after the individual had consumed alcohol he was very quiet and withdrawn. Tr. at 160.

The individual's wife testified that since December 2004 the individual has not consumed alcohol. Tr. at 167. She believes the individual is "a happier person and less stressed and we talk more." Tr. at 167. She testified that the individual is committed to AA. After his DWI the individual had lost his driver's license. Therefore, she drove him to a number of AA meetings. Tr. at 164.

The individual's son testified that he lived with the individual and his wife prior to 2000 when he graduated from college. Tr. at 160. He testified that during that period the individual consumed 4 or 5 beers per day on a regular basis. Tr. at 161. He testified that he does not believe that his father's consumption of alcohol ever caused any problems during the period he lived at home. Tr. at 161.

The individual's son testified that he believes his father has not consumed alcohol since December 2004 and "I'm confident that he will keep away from it, because he talks about praying and having a higher power, and he's never done that ever before. And I truly believe that he will stay away from it." Tr. at 170.

III. REGULATORY STANDARD

In order to frame my analysis, I believe that it will be useful to discuss briefly the respective requirements imposed by 10 C.F.R. Part 710 upon the individual and the hearing officer.

A. The Individual's Burden of Proof

It is important to bear in mind that a DOE administrative review proceeding under this Part is not a criminal matter, where the government would have the burden of proving the defendant guilty beyond a reasonable doubt. Once a security concern has been raised, the standard in this proceeding places the burden of proof on the individual to bring forth persuasive evidence concerning his eligibility for access authorization. 10 C.F.R. §§ 710.21(b)(6), 710.27(b), (c), (d).

This burden is designed to protect national security interests. The hearing is "for the purpose of affording the individual an opportunity of supporting his eligibility for access authorization." 10 C.F.R. § 710.21(b)(6). The individual must come forward at the hearing with evidence to convince the DOE that restoring his access authorization "would not endanger the common defense and security and would be clearly consistent with the national interest." 10 C.F.R. § 710.7(a).

This is not an easy evidentiary burden for the individual to sustain. The regulatory standard implies that there is a presumption against granting or restoring an access authorization. See *Department of Navy v. Egan*, 484 U.S. 518, 531 (1988) ("clearly consistent with the national interest" standard for the granting of access authorizations indicates "that security determinations should err, if they must, on the side of denials"); *Dorfmont v. Brown*, 913 F.2d 1399, 1403 (9th Cir. 1990), *cert. denied*, 499 U.S. 905 (1991) (strong presumption against the issuance of an access authorization). Consequently, it is necessary and appropriate to place the burden of persuasion on the individual in cases involving national security issues. In addition to her own testimony, the individual in these cases is generally expected to bring forward witness testimony and/or other evidence which, taken together, is sufficient to persuade the hearing officer that restoring access authorization is clearly consistent with the national interest. *Personnel Security Hearing (Case No. VSO-0002)*, 24 DOE ¶ 82,752 (1995).

B. Basis for the Hearing Officer's Decision

In a personnel security case under Part 710, it is my role as the hearing officer to issue a decision as to whether granting an access authorization would not endanger the common defense and security and would be clearly consistent with the national interest. 10 C.F.R. §710.27(a). Part 710 generally provides that "[t]he decision as to access authorization is a comprehensive, common-sense judgment, made after consideration of all relevant information, favorable and unfavorable, as to whether the granting of access authorization would not endanger the common defense and security and would be clearly consistent with the national interest." 10 C.F.R. § 710.7(a). I must examine the evidence in light of these requirements, and assess the credibility and demeanor of the witnesses who gave testimony at the hearing.

IV. ANALYSIS

A. Relapse Rate Required To Demonstrate Adequate Rehabilitation

The DOE consulting psychiatrist defines adequate evidence of rehabilitation as a determination, based on all the factors, that there is a 90% chance that the individual will not consume alcohol to intoxication in the next five years. In this analysis I will refer to that as the “10% chance of relapse standard.”

The DOE consulting psychiatrist believes that for an alcohol dependent individual to reach the “10% chance of relapse standard” he must normally participate in counseling, attend AA and be abstinent for 3 years. The DOE consulting psychiatrist’s methodology is well grounded. His understanding of the studies of relapse rates is clear. Further, his reasoning on how the results of those studies may be used to gain an insight into the risk of relapse of DOE employees seemed well thought out. However, he was unable to provide any basis for the premise that the DOE seeks a 10% probability of relapse in order to grant an access authorization. The Part 710 regulations offer him no support. I do not agree with the 10% chance of relapse premise. I believe the 10% standard is more stringent than is required for rehabilitation and an access authorization under Part 710.

There are two reasons that I believe that the 10% chance of relapse standard is too stringent. First, DOE consulting psychiatrists have generally recommended that individuals who are diagnosed as alcohol dependent should receive counseling, participate in AA and maintain their abstinence for two years in order to be considered rehabilitated.³ OHA Hearing Officers have adopted those recommendations and found that access authorizations should be restored if these factors are present. Personnel Security Hearing (Case No. TSO-0327), 29 DOE ¶ 82,840 (2005). Thus the DOE psychiatrist’s standard is not within the current OHA precedent.

The second reason is based upon the revised adjudicative Guidelines issued by the Assistant to the President for National Security Affairs on December 29, 2005. Those guidelines specify conditions that could mitigate an alcohol dependence diagnosis.⁴ I believe those guidelines suggest that mitigation can be achieved based on a program that is less stringent than that required to demonstrate a 10% chance of relapse. For instance, mitigation factor (b) indicates significant mitigation if an individual acknowledges that he is alcohol dependent, provides evidence of treatment and has established a pattern of abstinence. Generally, such a program would not require a period of abstinence sufficient to demonstrate a 10% chance

³ The DOE consulting psychiatrist’s testimony indicated that the two year standard for demonstrating rehabilitation is equivalent to a 20% chance of relapse standard, significantly higher than the 10% chance of relapse standard that he is recommending here.

⁴ The guidelines concerning these conditions read as follows:

- (b) the individual acknowledges his or her [alcohol dependence] or issues of alcohol abuse, provides evidence of actions taken to overcome this problem, and has established a pattern of abstinence (if alcohol dependent) or responsible use (if an alcohol abuser);
- (c) the individual is a current employee who is participating in a counseling or treatment program, has no history of previous treatment and relapse, and is making satisfactory progress;
- (d) the individual has successfully completed inpatient or outpatient counseling or rehabilitation along with any required aftercare, has demonstrated a clear and established pattern of modified consumption or abstinence in accordance with treatment recommendations, such as participation in meetings of Alcoholics Anonymous or a similar organization and has received a favorable prognosis by a duly qualified medical professional or a licensed clinical social worker who is a staff member of a recognized alcohol treatment program.

of relapse. Mitigating factor (c) indicates a current employee with no history of relapses who is making “satisfactory progress” in his treatment program. Again this indicates a program that would result in a relapse probability above 10%. Mitigating factor (d) requires completion of treatment and aftercare, a demonstration of abstinence and a positive prognosis from a profession. Again this suggests that the 10% risk of relapse is too harsh.

Accordingly, I will analyze the merits of the instant case with this background in mind.⁵

B. The Instant Case

I believe that for many years the individual consumed alcohol habitually to excess. In 2003 and 2004 his level of alcohol consumption increased and it became difficult for him to control his level of alcohol consumption. The testimony at the hearing convinces me that the individual recognizes that he has an alcohol problem, is actively engaged in counselling and AA, and has maintained abstinence for at least 15 months. The DOE consulting psychiatrist summed up the position of the three professionals when he said the individual “is doing all the right things.”

The only area of disagreement is that the individual’s experts believe that 15 months of abstinence is adequate in this case to mitigate the DOE security concern, whereas the DOE consulting psychiatrist believes that 2 years of abstinence, in this case, is sufficient to achieve the 10% risk of relapse necessary to mitigate the security concern.⁶ However, as discussed above, I believe that the 10% standard is too stringent because it is not in line with current White House guidance or with OHA precedents. Based on the DOE consulting psychiatrist’s testimony and the evidence in this proceeding, I believe that with 15 months of abstinence this individual has less than a 20% risk of relapse. I find that this risk is reasonable and that the individual has mitigated the Criteria J and H security concerns.

V. CONCLUSION

I have concluded that the individual has mitigated the criteria J and H security concerns related to his use of alcohol dependence. Accordingly, I find that the individual's access authorization should be restored.

The review procedures applicable to proceedings under Part 710 were revised effective September 11, 2001. 66 Fed. Reg. 47061 (September 11, 2001). Under the revised procedures, the review is performed by an Appeal Panel. 10 C.F.R. § 710.28(b)-(e).

Thomas L. Wieker
Hearing Officer
Office of Hearings and Appeals

Date: May 3, 2006

⁵ I recognize this is my analysis. I suggest that if security officials believe another approach is more appropriate, they should indicate their views in future notification letters or in testimony at future hearings.

⁶ The DOE consulting psychiatrist testified that in order to demonstrate a 10% chance of relapse 3 years of abstinence is generally required. However, he indicated that in view of this individual’s commitment and the strength of his rehabilitation program 2 years of abstinence would indicate a 10% chance of relapse.